Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 89–42)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued May 28, 1987, to September 12, 1988, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

(DRA–1–09)
Date: March 27, 1989.
File: 221252

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: The Bibb Co.
Articles: Hose yarns and fabric reinforcements
Merchandise: Polyester, rayon, nylon and polyvinyl alcohol (PVC) fiber
Factory: Porterdale, GA
Statement signed: June 17, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, July 15, 1988

(B) Company: Cablec Corp.
Articles: Electrical power cable with an aluminum core
Merchandise: Continuous cast aluminum rod
Factories: DuQuoin, IL; Paducah, KY; Yonkers, NY
Statement signed: January 4, 1988
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: New York, August 2, 1988

(C) Company: CIBA-GEIGY Corp.
Articles: Simazine technical
Merchandise: Monoethylamine (MEA)
Factory: St. Gabriel, LA
Statement signed: February 24, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 13, 1988

(D) Company: Collins & Aikman Corp.
Articles: Tufted carpet
Merchandise: Polyester web wadding
Factories: Albemarle, Faith, Old Fort & Troy, NC; Clinton, OK
Statement signed: December 28, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, August 16, 1988

(E) Company: E.I. du Pont de Nemours & Co., Inc.
Articles: "Benomyl" technical; "Benomyl", "Benlate" and "Tersan" fungicides
Merchandise: N-butylisocyanate (BI)
Factory: Belle, WV
Statement signed: April 14, 1988
Basis of claim: Used in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, July 19, 1988

(F) Company: E.I. du Pont de Nemours & Co., Inc.
Articles: Velpar® herbicides; hexazinone technical; hexazinone composition
Merchandise: Cyclohexylisocyanate a/k/a CHI
Factory: Houston, TX
Statement signed: April 18, 1988
Basis of claim: Used in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, September 12, 1988

(G) Company: E.I. du Pont de Nemours & Co., Inc.
Articles: Methomyl technical (a/k/a Nudrin® technical); Lannato® L methomyl insecticide (a/k/a Nudrin® L methomyl insecticide); Lannate® 90W methomyl insecticide; Lannate® LV methomyl insecticide
Merchandise: Acetaldoxime (AAO); hydroxylamine sulfate
Factory: Houston, TX
Statement signed: April 18, 1988
Basis of claim: Used in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, August 2, 1988

(H) Company: EverFresh Juice Co.
Articles: Reconstituted orange juice
Merchandise: Concentrated orange juice for manufacturing
Factory: Warren, MI
Statement signed: May 6, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), June 24, 1988

(I) Company: Fulflex, Inc.
Articles: Rubber mixed stocks, sheets, and strips
Merchandise: Synthetic rubber, titanium dioxide; zinc oxide
Factories: Scotland Neck, NC; Greenville, TN; Brattleboro, VT
Statement signed: October 20, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, August 5, 1988

(J) Company: The Goodyear Tire and Rubber Co., Chemical Div.
Articles: Wingstay L (flake), Flakax; Wingstay L (powder), Hindax
Merchandise: Para-cresol
Factories: Akron, OH; Calhoun, GA; Bayport, Houston, & Beaumont, TX; Niagara Falls, NY
Statement signed: December 18, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 9, 1988

(K) Company: Howard Carpet Mills, Inc.
Articles: Finished carpeting; air entangled yarn of various denier (textured yarn)
Merchandise: Bulk continuous filament extruded polypropylene yarn
Factories: Chatsworth & Eton, GA
Statement signed: May 23, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, August 18, 1988
Revokes: T.D. 88–42–N

(L) Company: ICI Americas Inc.
Articles: Tenoretic tablets
Merchandise: Atenolol (4-(2′-hydroxy-3′-isopropylamino-propoxy) phenyl-acetamide); chlorthalidone (benzene-sulfonamide, 2-chloro-5-(2,3-dihydro-1-hydroxy-3-OXO-1 H-isoindol-1-YL)
Factory: Newark, DE
Statement signed: April 18, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), August 22, 1988

(M) Company: ICI Americas, Inc., Permuthane Coatings Div.
Articles: Liquid resin solutions
Merchandise: Polyurax Polyol PPC-1025; n-methyl-2-pyrrolidone (m-pyrol)
Factory: Peabody, MA
Statement signed: May 11, 1987
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, June 15, 1987
Revokes: T.D. 86–126–Q to cover successorship from Permuthane Inc.

(N) Company: ICI Americas, Inc., Permuthane Coatings Div.
Articles: Liquid resin solutions
Merchandise: Isophorone diisocyanate; tri(2-ethylhexyl) phosphate; isophorone diamine; hexanediol; othylene carbonate; n-butyl acrylate; methyl methacrylate
Factory: Peabody, MA
Statement signed: May 11, 1987
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, June 11, 1987
Revokes: T.D. 86–126–P to cover successorship from Permuthane Inc.

(O) Company: ICI Americas Inc., LNP Engineering Plastics Div.
Articles: Flourocomp line of products; lubricated thermocomp line of products; fluorocarbon pellets and powder
Merchandise: PTFE fluorocarbon resin (polytetrafluoroethylene)
Factories: Thorndale, PA; Santa Ana, CA; Columbus, IN
Statement signed: May 11, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, May 28, 1987
Revokes: T.D. 85–190–K to cover successorship from LNP Corp.

(P) Company: Industrial Coatings Group, Inc.
Articles: Coated piece goods
Merchandise: Greige piece goods
Factory: Chicago, IL
Statement signed: September 3, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, October 9, 1987
Revokes: T.D. 78–470–P to cover a name change from Joanna Western Mills Co.

(Q) Company: Lockhart Chemical Co.
Articles: Corrosion inhibitors
Merchandise: Alkyl benzene sulfonic acid 117, 119 & 157
Factory: Flint, MI
Statement signed: April 25, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 29, 1988
Revokes: T.D. 84–155–L (Kimes Corp.)

(R) Company: Paul Mueller Co.
Articles: Equipment: food processing, dairy plant, carbonated beverage, brewery, chemical, textile and pharmaceutical, and poultry processing; tank heads, heat transfer surface; insulated and single wall tanks; conveyors
Merchandise: Stainless steel coils, sheets and plates
Factories: Springfield, MO; Osceola, IA
Statement signed: May 11, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, June 5, 1987
Revokes: T.D. 76–319–F to cover additional factory

(S) Company: Nashua Corp.
Articles: Jackets; diskettes in jackets
Merchandise: Vinyl sheet
Factory: Nashua, NH
Statement signed: March 15, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, August 22, 1988

(T) Company: Neville Chemical Co.
Articles: Hydrocarbon resins
Merchandise: Dicyclopentadieno and resin oil
Factories: Pittsburgh, PA; Anaheim, CA
Statement signed: May 15, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Houston, June 13, 1988

(U) Company: The Perkin-Elmer Corp.
Articles: Micralign projection mask aligner system (various models); etched fused silica masks
Merchandise: Zerodur glass-ceramic blanks; Suprasil and Suprasil 2 blanks; fused silica blanks
Factories: Wilton (2) & Danbury, CT
Statement signed: March 23, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, July 19, 1988
Revokes: T.D. 85–139–P

(V) Company: The Pillsbury Co.
Articles: Blended and graded wheat and cleaned, blended and graded wheat
Merchandise: Various classes and grades of wheat
Factories: Various factories as listed in statement
Statement signed: February 5, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, June 22, 1988

(W) Company: R & D Services, Inc. (d/b/a Continental Flavors & Fragrances de Puerto Rico)
Articles: Various food and beverage flavor bases
Merchandise: Citrus pectin
Factory: Arecibo, PR
Statement signed: December 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles, August 2, 1988

(X) Company: R & D Services, Inc. (d/b/a Continental Flavors & Fragrances de Puerto Rico)
Articles: Various food and beverage flavor bases
Merchandise: Concentrated apricot puree
Factory: Arecibo, PR
Statement signed: December 11, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Los Angeles (San Francisco Liquidation), August 31, 1988

(Y) Company: Reading Alloys, Inc.
Articles: 50% aluminum—50% vanadium master alloy
Merchandise: Fused flake vanadium pentoxide
Factory: Robesonia, PA
Statement signed: August 24, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), August 30, 1988
Revokes: T.D. 76–249–A

(Z) Company: Utica Corp.
Articles: Rough forged engine blades and other aircraft parts
Merchandise: Titanium alloy bar (90Ti–6A1–4Vn)
Factories: Whitesboro, NY (2)
Statement signed: March 8, 1988
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: New York, June 28, 1988
Revokes: T.D. 85–41–O (Kelsey-Hayes Co.)

U.S. Customs Service

General Notices

NOTICE THAT ENTRY/ENTRY SUMMARY REQUIRED FOR IMPORTATION OF HONG KONG TEXTILES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of change of effective date.

SUMMARY: Customs published a notice in the Federal Register (54 FR 3281) on February 1, 1989, stating that Customs was delaying implementation of the requirement that an entry/entry summary ("live" entry) be filed for all textiles and textile entries of Hong Kong which have a textile category number. The effective date set for the requirement in that notice was April 1, 1989. A determination has been made to delay the effective date of the requirement until September 1, 1989.

EFFECTIVE DATE: September 1, 1989.

FOR FURTHER INFORMATION CONTACT: Dick Crichton, Office of Trade Operations, (202) 566–9443 or Ilene Gilbert, Office of Trade Operations, (202) 566–6006.

SUPPLEMENTARY INFORMATION: On January 5, 1989, Customs published a document in the Federal Register (54 FR 349), stating that Customs will require the filing of an entry/entry summary ("live" entry) for all textiles and textile products which have a textile category number, effective February 1, 1989. A correction document for that notice was published on January 17, 1989, (54 FR 1844). On February 1, 1989, Customs published a notice of change of effective date (54 FR 3281) to April 1, 1989. A decision has been made by Customs to delay the effective date of the entry/entry summary requirements for Hong Kong textiles and textile articles until September 1, 1989, to allow for a more modern environment in which it is anticipated that electronic filers will have available an option to separate payment from the filing of the entry summary documentation. This will allow for more expeditious flow of cargo while providing improved statistical data. This document is a notice of the delayed effective date.

Date: March 27, 1989.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, March 31, 1989 (54 FR 13292)]

POSITION STATEMENT ON RELATIONSHIPS BETWEEN CUSTOMS BROKERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Statement of position.

SUMMARY: Notice is hereby given that relationships between Customs brokers must include responsible supervision and control by the employer-broker over the employee-brokers. Unless a bona fide employer-employee relationship exists, a licensed Customs broker cannot conduct Customs business for another licensed broker's client.

EFFECTIVE DATE: April 2, 1989.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Chief, Entry Rulings Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2215, Washington, D.C. 20229, (202) 566–5856.

SUPPLEMENTARY INFORMATION:

In order to conduct Customs business for a client in a district, a person must be a licensed Customs broker and must have a permit to operate in that district as required by 19 U.S.C. 1641(a)(1), (b)(1) and (c) and 19 CFR 111.2. In addition to those requirements, the broker also has a statutory duty to exercise responsible supervision and control over the Customs business that it conducts. This statement outlines the position of the Customs Service on the scope of responsible supervision and control.

The Customs Service is aware that some Customs brokers have claimed an employer-employee relationship with another broker in order to conduct Customs business for a client at a location where the so-called employer-broker does not have an office or in a district in which the so-called employer-broker has no permit to operate. A variation of this occurrence is when the Customs broker acts for a client and also is the consignee of the goods imported by the broker's client. That broker employs another broker to perform the Customs business because the consignee-broker lacks a proper permit, an office, or both, at that place where the transaction occurs. In each of these instances, no legal relationship is created between

the first broker's client and the broker who performs the Customs business.

Relevant Statutory and Regulatory Requirements

The Act of October 30, 1984, Title II sec. 212, Pub. L. 98–573, 98 Stat. 2978, amended 19 U.S.C. 1641. In relevant part, that Act defined Customs business, set a specific requirement that a licensed broker shall exercise responsible supervision and control over the Customs business it conducts, prohibited a broker from employing a convicted felon without written permission, required a broker to obtain a permit for each Customs district in which the broker conducts Customs business and prohibited a broker from violating any regulation issued under the Customs laws.

In order to implement the statute, certain regulations were promulgated. By virtue of 19 CFR 111.23, a broker must keep records of each transaction performed at the district where performed, unless the Customs Service permits the records to be stored in central files for a multi-district broker. Under regulation 19 CFR 111.28, a broker must furnish the names and addresses of its employees to the district director of each district where the broker has a permit. A broker may not allow any unlicensed person, other than the broker's own employee, to perform a Customs transaction (19 CFR 111.37).

Must Exercise Responsible Supervision and Control

In the regulations promulgated following the amendment of 19 U.S.C. 1641 by the Act of October 30, 1984, the Customs Service stated its position on the scope of responsible supervision and control. This regulation (19 CFR 111.11) defines "responsible supervision and control" as "that degree of supervision and control necessary to ensure that the employee provides substantially the same quality of service in handling Customs transactions" that the employing broker is required to provide. In general, this means that the employer-broker has the right to direct and control the method and manner in which the work shall be done and the result accomplished. By contrast, a person who hires an independent contractor does not enter into an employer-employee relationship; as such, an independent contractor retains the right to select the method and manner to perform the work, free from the direction and control of the person who hires the contractor in all matters, except as to the result or product of the work. There are substantial differences in the legal consequences that flow from the two relationships, particularly in liability and tax matters.

Under 26 U.S.C. 3401(c) and (d), the term "employee" and "employers" are defined for purposes of the Internal Revenue Code. The common law rules in determining the employer-employee relationship apply. *Marvel* v. *U.S.*, 719 F. 2d. 1507, 1514–1516 (10th Cir. 1983); *Matter of Southwest Restaurant Systems, Inc.*, 607 F. 2d 1237

(9th Cir. 1979). Generally, by virtue of 26 U.S.C. 3402, an employer is required to deduct and withhold a tax on the wages of each employee. Under 26 U.S.C. 3403, an employer is liable for the payment of the tax imposed by section 3402. Unless an exemption is applicable, a licensed broker who claims that it is the employer of another licensed broker would be responsible for collection of the withheld tax on its employee-broker's wages.

In an employer-employee relationship, unless it can be shown that an employee was clearly outside the scope of the employment, an act of the employee binds the employer. This generally is not true in an independent contractor relationship. This distinction can be illustrated in the following situation. A homeowner who contracts with a moving company to move the homeowner's furniture is in an independent contractor relationship with the moving company. The driver of the moving company truck is in an employer-employee relationship with the moving company. The homeowner is not responsible for tax withholding; the moving company is responsible for tax withholding. If the driver is negligent and causes an accident, the moving company would be liable, but the homeowner would not be liable. This difference in consequences stems from the difference in authority to supervise and control the driver's actions and to pay the driver's wages. The homeowner lacks the ability to tell the driver how to drive; the moving company has authority to instruct and to supervise and control the actual driving.

Supervision and control in the employment context generally means the actual power to hire, fire and discipline. *N.L.R.B.* v. *Security Guard Services, Inc.*, 384 F. 2d. 143, 147–249 (5th Cir. 1987). It refers to the acts of overseeing with direction or inspecting with authority. *Glenview Park Dist.* v. *Melhus*, 540 F. 2d. 1321, 1326 (7th Cir. 1976). An employee has been defined as a person who renders service to another for wages and who in the performance of such service is entirely subject to the direction and control of the employer. *Weaver* v. *Weinberger*, 392 F. Supp. 721, 723 (S.D. W. Va. 1975); *Beliz* v. *W. H. McLeod & Sons Packing Co.*, 765 F. 2d. 1317, 1327–1330 (5th Cir. 1985); and *Sandwiches, Inc.* v. *Wendy's Intern., Inc.*, 654 F. Supp. 1066 (E.D. Wisc. 1987).

In the Customs broker situation, if a broker claims that another broker is its employee, certain legal consequences follow. If the first broker fails to report the name and address of the so-called employee-broker or an employee of that broker, there would be a violation of 19 CFR 111.28(b). If the second broker is an employee, an error by either the employer-broker or the employee-broker could result in liability for the employee-broker under 19 U.S.C. 1592. Such liability could arise, for example, if the employer-broker negligently fails to send all of the correct information to the employee-broker so that there is a misclassification or an undervaluation on the entry, or if the employer-broker sends the correct information to the employee-broker, but the employee-broker is negligent in its use so

that there is a misclassification or an undervaluation on the entry. The inability to control or supervise the so-called employee because of the actual legal relationship between the two brokers simply does not comply with the statutory requirement that a broker must exercise responsible supervision and control over the Customs business it conducts. It is the position of the Customs Service that the requisite responsible supervision and control of all Customs transactions conducted by a broker for a client can be exercised only in an employer-employee relationship and not in an independent contractor relationship.

Other Requirements

If an employer-employee relationship is claimed between two brokers and the employee-broker knowingly employs a convicted felon without receiving written permission to do so, it would follow that the employer-broker also is in violation of 19 U.S.C. 1641(d)(1)(E), as implemented by 19 CFR 111.53(e). If an independent contractor relationship is claimed between two brokers, and the Customs transaction is performed in the name of the hiring broker by an employee of the independent contractor who is not a licensed broker, the hiring broker is in violation of 19 CFR 111.37 and 19 U.S.C. 1641(d)(1)(C).

Unless there is a bona fide employer-employee relationship between two brokers located in two districts, when a broker uses the services of another broker in order to conduct Customs business for the first broker's client, compliance with 19 CFR 111.19 and 19 CFR 111.23 is difficult or impossible. If a broker who did not have a permit to operate in a district used the services of a broker who had the needed permit, without first establishing an employer-employee relationship, and with total retention of the client by the first broker, such arrangement would frustrate the statutory purpose of 19 U.S.C. 1641(c)(1)(A). The procedure set forth in C.S.D. 79–111 is acceptable in this situation.

Broker as Importer

Under the Act of January 12, 1983, sec. 201 Pub. L. 97–446, 90 Stat. 23249, required entry documents must be filed by an owner, a purchaser, or a licensed broker appointed by the owner, purchaser, or consignee of the merchandise. This requirement does not apply to a release under the immediate delivery procedure (19 U.S.C. 1448(b) and 19 CFR 142.21–142.27), because an immediate delivery release is not an entry; however, the requirement does apply to the filing of the entry following the release under the immediate delivery procedure. In the case of temporary importations under bond (subheadings 9813.00.05–9813.00.75, HTSUS) and permanent exhibition importations (subheadings 9812.00.20 and 9812.00.40, TSUS), the person to whom the merchandise is sent is considered by the Customs Service to be the owner or purchaser of the merchandise

and can file the entry documents or appoint a licensed broker to file the entry documents.

If a consignee, absent the above exceptions, appoints a broker, the entry documents must be filed by that broker, who must be shown as the importer of record. The bond used to secure performances must be that broker's bond. That broker is the importer of record and is subject to all of the responsibilities of an importer. A broker who is the importer of record, in addition to being subject to compliance with 19 U.S.C. 1641 and 19 CFR Part 111, might not be eligible for the mitigation guidelines for Customs brokers set forth in paragraph (I) of Appendix B of 19 CFR Part 171.

When the broker is the importer of record, its bond secures all entry obligations, unless a superseding bond is filed by the actual owner of the merchandise, as permitted by law. A consignee who is not the owner lacks the authority to become the importer of record in its own right.

Position and Effective Date for Implementation

The position of the Customs Service is that unless a bona fide employer-employee relationship exists, a licensed Customs broker cannot conduct Customs business for another licensed broker's client. Alternatively, C.S.D. 79–111 can be used since the relevant broker-client relationship is between the broker who is actually performing the work for the client and the broker who is responsible for that performance.

This position, which was issued in response to the narrow question of whether one broker could file a Customs Form 3461 Alt for another broker on behalf of that second broker's client is not limited to the filing of any particular Customs form. The position applies to the conduct of all Customs business by a licensed broker.

The principles on which the Customs position is based were published in C.S.D. 79–111, in T.D. 86–161, and in various unpublished letter rulings.

For these reasons, the effective date for enforcing this position is April 2, 1989.

Approved: March 24, 1989.

William von Raab,
Commissioner of Customs.

[Published in the Federal Register, March 30, 1989 (54 FR 13136)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Decisions of the United States Court of International Trade

(Slip Op. 89–32)

HANNIBAL INDUSTRIES, INC. AND WESTERN TUBE & CONDUIT CORP., PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS

Court No. 87–08–00848

A material injury determination on the effect of dumped imports may not be lawfully based solely on the gross revenue loss to the domestic industry's product line when the record contains sufficient information to make that determination as to the domestic like product.

[Remanded.]

(Decided March 17, 1989)

Schagrin Associates (*Roger B. Schagrin, Paul W. Jameson* and *Mark C. Del Bianco*) for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel, United States International Trade Commission (*Timothy M. Reif*) for defendants.

DICARLO, *Judge:* Pursuant to Rule 56.1 of the Rules of this Court, plaintiffs challenge the final negative determination of the United States International Trade Commission (Commission) in *Certain Welded Carbon Steel Pipes and Tubes from Taiwan*, Inv. No. 731–TA–349 (Final), USITC Pub. 1994 (July 1987). The Commission determined that a United States industry is neither materially injured nor threatened with material injury by reason of less than fair value imports of Taiwanese produced light-walled rectangular pipes and tubing (L–WR).

This Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(A)(i) and (B)(ii) (Supp. IV 1986) and 28 U.S.C. § 1581(c) (1982). The Court finds that a material injury determination on the effect of dumped imports may not lawfully be based solely on the gross revenue loss to the domestic industry's product line when the record contains sufficient information to make that determination as to the domestic like product. The Court remands to the Commission to determine whether the impact of less than fair value imports on sales of the domestic like product constitutes material injury or threat of material injury and to explain the basis for its determination. The Commission's findings on the foreign producers' capacity and capacity

utilization and the Taiwanese self-restraint program are supported by substantial evidence on the record and according to law.

BACKGROUND

Commerce found less than fair value sales of L–WR by Yieh Hsing Enterprise Co., Ltd. (Yieh Hsing), the only Taiwanese producer that exported L–WR to the United States during investigation period from May 1 to October 31, 1986. *See Certain Light-Walled Rectangular Welded Carbon Steel Pipes and Tubes From Taiwan; Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 20,440 (June 1, 1987).

Shortly before making its final determination, the Commission discovered that other Taiwanese companies had exported L–WR after October 1986, and that these companies may have been largely responsible for an increase in L–WR exports to the United States during the first quarter of 1987. R. 69 at 3–5. The Commission reopened its investigation to identify the other producers and determine their capacity and capacity utilization. R. 79. After this further investigation, all five commissioners found no material injury and three of the commissioners also found no threat of material injury to a domestic industry of reason of dumped L–WR.

In her separate analysis of causation of material injury, the Chairman used a "five factor test" that focused on unfair price discrimination. USITC Pub. 1994 at 29–43. At the Commission's request, the Court remanded this portion of the determination in view of *USX Corp.* v. *United States*, 12 CIT——, 682 F. Supp. 60 (1988), which found that this five-factor test improperly shifted focus of the investigation to an injury by predation standard. *See also Maverick Tube Corp.* v. *United States*, 12 CIT——, 687 F. Supp. 1569 (1988). On remand, the Chairman adopted the Vice Chairman's views on causation and her finding of no material injury.

DISCUSSION

An additional affirmative vote on either material injury or threat would have made this determination affirmative since an affirmative vote on either material injury or threat is treated as a vote that the overall determination should be affirmative. 19 U.S.C. § 1677(11) (1982); 19 C.F.R. § 207.9 (1988).

I. *MATERIAL INJURY*

In the material injury portion of the determination, the analyses of three of the commissioners are uncontested. Plaintiffs challenge only the Chairman and Vice Chairman's joint causation of material injury analysis. The sole issue is whether the determination may be based on the impact of imports on total gross revenues of the domestic industry where the record permits analysis of the impact of imports on sales of the domestic like product.

The Chairman and Vice Chairman found that the domestic industry consists of producers of L–WR, who also produce other products. They calculated the additional revenue the domestic industry would have received if they had gained all of the sales that went to Taiwanese imports. That additional revenue was calculated to be 4.1 percent of the industry's 1986 L–WR shipments, and 1.3 percent of the industry's total sales, including products other than L–WR. The Chairman and Vice Chairman concluded that they did not believe "that a maximum gross revenue loss of less than 1.3 percent is material injury within the meaning of the controlling statutes." USITC Pub. 1994, at 85–86. They thus evaluated the injury to producers of L–WR by looking at those producers' entire production instead of that part that was affected by imports. Plaintiffs allege this is the first time that any Commissioner has made an injury determination dependent on the relationship between a company's total production and revenue losses attributable to imports of the product under investigation.

It is incumbent on the Commission to assess the effect of dumped imports in relation to United States production of a like product if available data permit separate identification of production

> in terms of such criteria as the production process or the producer's profits. If the domestic production of the like product has no separate identity in terms of such criteria, then the effect of the * * * dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.

19 U.S.C. §§ 1677(4)(D) (1982). "Like product" refers to "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to * * * investigation * * *." 19 U.S.C. § 1677(10) (1982); *see Citrosuco Paulista, S.A.* v. *United States*, 12 CIT——, Slip Op. 88–176, at 8 (Dec. 30, 1988); *Asociacion Colombiana de Exportadores de Flores* v. *United States*, 12 CIT——, 693 F. Supp. 1165, 1169 (1988). The narrowest group or range of products which includes a like product is referred to as the "product line." 19 U.S.C. § 1677(10) (1982). The product-line provision is an exception to the general rule that the Commission is to examine the impact of dumped imports with respect to relevant economic factors relating to a like product. 19 U.S.C. § 1677(4)(D) (1982); *see Mitsubishi Elec. Corp.* v. *United States*, 12 CIT——, 700 F. Supp. 538, 563 (1988).

The Chairman and Vice Chairman decided the investigation warranted a product-line analysis of the domestic industry's financial condition because (1) separate identification of profits and the production process was allegedly impossible based on the available data, (2) the ease of converting production from L–WR to other types of pipe and tubing, and (3) a product-line analysis was consistent with prior L–WR investigations.

Plaintiffs do not dispute that in analyzing the financial condition of the domestic industry, the Commission may examine profits, productivity, employment, cash flow, capacity utilization, and other relevant economic factors according to the entire establishment producing a like-product. 19 U.S.C. § 1677(4)(D) (1982). "Congress did not intend to require the Commission to obtain separate data on every enumerated economic factor; rather, it directed the Commission to obtain such data, where possible, as allows it to make 'a reasonably separate consideration.' " *Kenda Rubber Indus. Co.* v. *United States*, 10 CIT 120, 125, 630 F. Supp. 354, 357–58 (1986). The issue here, however, is not whether the Commission is required to obtain separate data, but rather whether the Commission is required to consider separate data it actually has.

While the Commission had economic information on producers' profits, investment return, cash flow, ability to raise capital, and investment on only a product-line basis, separate data were available on output, sales revenue, market share, capacity utilization, inventories, employment and wages that pertained only to L–WR. *See* Conf. R. 9. The Chairman and Vice Chairman had sufficient information to calculate the additional revenue the domestic industry would have received if they had gained all of the sales that went to Taiwanese imports, which was 4.1 percent of the value of the industry's 1986 L–WR shipments, and 1.3 percent of the industry's total sales, including products other than L–WR. USITC Pub. 1994, at 85. Although they had sufficient information to calculate a figure of 4.1 percent of the value of L–WR shipments, the Chairman and Vice Chairman based their material injury determination on the 1.3 percent revenue loss to total production of L–WR and other products.

Under the Chairman and Vice Chairman's analysis, the grant or denial of import relief depends on the extent to which L–WR is made in the same domestic facilities as other products. This approach differentiates between (1) firms for whom L–WR is a large percentage of total production and revenue and firms for whom it is a small percentage, and (2) firms who are able to diversify production from L–WR and firms who are less capable of doing so. The definition of "like product" should not be "interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation." S. Rep. No. 249, 96th Cong., 1st Sess. 90–91, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 476–77.

Since the Chairman and Vice Chairman had sufficient information to reach a figure of 4.1 percent of the value of L–WR shipments, ignoring the available data on the L–WR in favor a lower 1.3 percent figure for total domestic sales of all products is contrary to law. The Court remands the causation of material injury portion of the Chairman and Vice Chairman's analysis to the Commission to determine whether the impact of less than fair value imports on sales of the domestic like product constitutes material injury or

threat of material injury. The Commission may evaluate whether a revenue loss of 4.1 percent of the 1986 L–WR shipments constitutes material injury or threat of material injury, or employ any other appropriate analysis which the Court can then review.

II. *THREAT OF MATERIAL INJURY*

Plaintiffs also challenge the Chairman and Vice Chairman's findings in the threat of material injury portion of the determination and the separate threat findings of Commissioner Lodwick. The Chairman, Vice Chairman, and Commissioner Lodwick found no threat of material injury to a domestic industry by reason of dumped L–WR. Plaintiffs contend that the findings on the Taiwanese producers' capacity and capacity utilization and on the Taiwanese self-restraint program for steel exports in their threat analyses are unsupported by the record and not in accordance with law.

A. *The Taiwanese Producers' Capacity and Capacity Utilization*

19 U.S.C. § 1677(7)(F) does not define "threat" but instructs the Commission to consider relevant economic factors in determining whether an industry in the United States is threatened with material injury by reason of imports of dumped merchandise, including:

> (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States, [and]
>
> (VI) the presence of underutilized capacity for producing the merchandise in the exporting country[.]

19 U.S.C. § 1677(7)(F)(i) (Supp. IV 1986). *See Citrosuco Paulista, S.A. v. United States*, 12 CIT——, Slip Op. 88–176, at 42–43 (Dec. 30, 1988).

The Chairman and Vice Chairman found that Yieh Hsing's capacity to produce L–WR increased substantially in 1984 but remained constant through 1986 into 1987 and that its capacity utilization dropped in 1985 and 1986 but was projected to rise in 1987. USITC Pub. 1994 at 22. They found, however, that the record is "highly equivocal about the extent to which other Taiwan producers have the capacity to export L–WR pipe to the United States." *Id.* The Chairman and Vice Chairman characterized the data collected on the capacity and capacity utilization of these other producers as "sketchy and highly questionable." *Id.* at 23. Nevertheless, they stated that

> [b]ased on information gathered through telephone conversations with U.S. government representatives in Taiwan, it appears that these six producers may have substantial L–WR production capability. However, the estimates of the size of that capability and the extent of actual Taiwan exports to the United States are so far out of line with other data gathered in this investigation that they appear to be unreliable.

Id. Given the perceived unreliability of the data from these telephone conversations, the Chairman and Vice Chairman concluded that the evidence demonstrated no threat of material injury.

In his separate concurrence, Commissioner Lodwick stated that information as to other Taiwanese producers was "either uncertain or seemingly contradictory" and provided "no solid basis for a real and imminent determination." USITC Pub. 1994 at 93. The Commissioner explained that "[w]here information is more clearly established and where annual data have been provided since 1984, there has been no increase in reported Taiwan industry capacity during 1984–1987." *Id.*

Plaintiffs claim the Commission's information on Taiwanese production capacity was inadequate because the Commission had no information on firms with the majority shares of L–WR exports between January 1986 and March 1987. Plaintiffs also assert that the Commission had information on the capacity utilization of only Yieh Hsing. Plaintiffs argue this lack of information renders the majority's conclusion that the information shows no real and imminent threat of material injury to the domestic industry unsupported by the record.

In challenges to the Commission's investigative thoroughness, the court has remanded determinations only for failure to seek necessary information. *USX* v. *United States*, 11 CIT——, 655 F. Supp. 487, 498–99 (1987); *Budd Co. Ry. Div.* v. *United States*, 1 CIT 67, 74–79, 507 F. Supp. 997, 1003–06 (1980).

The Commission recognized that it lacked data on the capacity and capacity utilization of the other Taiwanese producers and therefore reopened the investigation. R. 69 at 3–5; R. 79. There was some confusion about the actual number of Taiwanese companies with the capacity to produce and export L–WR. Plaintiffs' petition listed Yieh Hsing and three other firms as possible producers of L–WR. USITC Pub. 1994 at 22. These three other firms did not, however, export L–WR. *Id.* at 23. Yieh Hsing identified two firms capable of producing and exporting L–WR to the United States, but characterized these as "small producers of a limited range of products." R. 53 at 3–4.

The Commission sought information as to the production capacity and capacity utilization of the other firms from: (1) Commerce's Special Summary Steel Invoices (SSSI) listing export data, (2) the American Institute in Taiwan (AIT), and (3) several Taiwanese producers through questionnaires and telephone interviews. From the SSSI, the Commission obtained information on the 1986 L–WR pipe production capacity of five Taiwanese producers who collectively accounted for a confidential percent of imports from Taiwan between January 1986 and March 1987. Conf. R. 20 at 1. The AIT provided capacity data on four companies. Conf. R. 20 at 2. The AIT also conducted an informal survey of several mini-mills in Taiwan which revealed that up to ten may produce L–WR. Conf. R. 20 at 2. The staff

report indicates, however, that the AIT data "largely represent capacity to produce other pipes and tubes in addition to the L–WR." Conf. R. 20 at 2.

The Commission also had capacity utilization data on three of the five producers identified by the AIT. Conf. R. 20 at 2. The remaining two firms reported they had no capacity to produce L–WR. The Commission also unsuccessfully sought capacity utilization information from a sixth producer.

In addition to the statutory time constraints imposed upon an investigation, the Commission staff faced additional problems in obtaining information. First, only Yieh Hsing responded to the Commission's questionnaires. Second, the United States no longer maintains formal diplomatic relations with the Republic of China. Therefore, the Commission had to rely on the AIT and the producers themselves to provide information.

Given the short statutory deadlines in an injury investigation and the difficulties facing the Commission in obtaining information, *see Atlantic Sugar, Ltd.* v. *United States*, 2 Fed. Cir. (T) 130, 133–34, 744 F.2d 1556, 1560 (1984), the Commission made a reasonable effort to obtain the information needed to make the determination. Plaintiffs' contention that the Commission could have obtained more data is irrelevant. The question is not whether the Commission might have obtained additional information, but whether the determination is supported by substantial evidence on the record and according to law. *Id.* at 134–35, 744 F.2d at 1561; 19 U.S.C. § 1516a(b)(1)(B) (1982).

Plaintiffs argue that evidence in the record detracts from the substantiality of evidence required to support the Commissioners' conclusion regarding the productive capacity and capacity utilization of firms that exported L–WR to the United States.

The record shows that much of the information provided by the four other firms conflicts with that provided by the AIT and the SSSI in terms of exports to the United States, capacity utilization, and capacity to produce only L–WR. Conf. R. 20 at 2. Except for Yieh Hsing and one other firm, a comparison of the AIT information and the SSSI data shows that no other Taiwanese firms which exported L–WR to the United States since January 1986 provided data on their capacity or capacity utilization. Conf. R. 20 at 2. Based on this record, the Chairman and Vice Chairman concluded that the estimates of large capacity levels of certain Taiwanese producers reported by the AIT were not sound and reliable. USITC Pub. 1994 at 23, 93.

A Commission determination is presumed correct and the party challenging the determination must show that it is unsupported by the record or not in accordance with the law. 28 U.S.C. § 2639(a)(1) (1982); *see Copperweld Corp.* v. *United States*, 12 CIT ——, 682 F. Supp. 552, 575 (1988). Plaintiffs argue that the Commission's lack of information on capacity and capacity utilization was "particularly

important in light of the fact that each of these companies had a very high potential for increasing its exports, since each had only begun exporting L–WR to the United States in the last five months of the investigation period." *Plaintiffs' Reply Brief* at 17. Other than this five-month increase in exports, there is no evidence in the record to support the plaintiffs' assertion of a very high potential.

Even if plaintiffs were correct that the Taiwanese firms had a high potential for increasing production, the "mere fact of increased capacity does not *ipso facto* imply increased exports to the United States." *American Spring Wire Corp.* v. *United States*, 8 CIT 20, 28, 590 F. Supp. 1273, 1280 (1984), *aff'd sub nom. Armco Inc.* v. *United States*, 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985). "A Commission finding that levels of imports will increase must be based on 'positive evidence tending to show an intention to increase the levels of importation.'" *Id.* (*quoting Matsushita Elec. Indus. Co.* v. *United States*, 6 CIT 25, 28, 569 F. Supp. 853, 857, *reh'g denied*, 6 CIT 187, 573 F. Supp. 122 (1983)).

Since it involves the projection of future events, the threat of material injury analysis is inherently "less amenable to quantification" than the material injury analysis. *Rhone Poulenc, S.A.* v. *United States*, 8 CIT 47, 59, 592 F. Supp. 1318, 1329 (1984). Congress directed the Commission to consider relevant economic factors, including capacity and capacity utilization, in its threat of material injury determination. 19 U.S.C. § 1677(7)(F)(i) (Supp. IV 1986). Moreover, Congress vested the Commission with broad discretion "to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council* v. *United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). The determination that there is a threat of material injury may not be based merely on "conjecture or supposition" but rather on "evidence that the threat of material injury is real and the actual injury is imminent." 19 U.S.C. § 1677(7)(F)(ii) (Supp. IV 1986).

The Chairman and Vice Chairman considered the capacity and capacity utilization of the Taiwanese firms but concluded the data were not probative. Rejecting these data, they then based their determination on other economic factors. The Chairman and Vice Chairman made a reasonable interpretation of the evidence and its significance, any complaint that the Commission drew an "adverse inference" against the plaintiffs is irrelevant. Since they considered capacity and capacity utilization data on the Taiwanese firms the Chairman and Vice Chairman acted according to law in refusing to conjecture as to their effect. *See* 19 U.S.C. § 1677(7)(F)(ii) (Supp. IV 1986). That the Commission had data on allegedly less than a majority of firms that actually exported L–WR to the United States does not render the determination unsupported by substantial evidence. *See Atlantic Sugar*, 2 Fed. Cir. (T) at 138, 744 F.2d at 1563. Accordingly, the Chairman and Vice Chairman's findings as to the

Taiwanese producers' capacity and capacity utilization are supported by substantial evidence on the record as a whole and are in accordance with law. For the same reasons Commissioner Lodwick's findings as to the capacity and capacity utilization of Taiwanese L–WR producers are according to law and supported by substantial evidence in the record.

B. *The Taiwanese Self-Restraint Program*

Although it refused to enter into a voluntary restraint agreement (VRA) with the United States, Taiwan implemented a self-restraint program in September 1986 to limit steel exports to the United States. R. 60. This program is an informal, unilateral system which, unlike a VRA, the United States has no right to enforce. USITC Pub. 1994 at A–7; R. 48 at 109–11; R. 60 at 1. The Taiwan Steel & Iron Industry Association administers the program under direction of its government. R. 60. The program has a set quota of 20,000 short tons per month for all steel products, subdivided into a "fixed" quota of up to 90 percent of the total and a "free" quota constituting the remaining 10 percent. *Id.*; Supp. R. 2 at 15.

The fixed quota is allocated quarterly among 109 Taiwanese steel producers and exporters and is calculated from their respective export levels to the United States between April 1985 and July 1986. R. 60. Nine firms including Yieh Hsing account for over half of the fixed quota allocations. *Id.* No firm may export more than 25 percent of its annual quota in any quarter, but it may transfer its allocation to another firm. *Id.*

The free quota is allocated on the basis of price bids among the firms and is divided into five product categories, one of which covers all plate and welded pipe products (including L–WR). This category constitutes 35 percent of the free quota. *Id.* No single firm may account for more than 30 percent of the volume in any of these categories. *Id.* The free quota may be expanded to include any unused portion of the fixed quota from the previous quarter and "special volumes" approved by Taiwan's Board of Foreign Trade.

1. *The Chairman and Vice Chairman's determination*

Rather than depending on capacity and capacity utilization data perceived to be "sketchy and highly questionable," the Chairman and Vice Chairman concluded that as a result of the Taiwanese self-restraint program, "any existing or unused L–WR pipe production capacity is unlikely to result in a significant increase in imports of the merchandise to the United States" even if the Taiwanese companies have substantial capability to produce L–WR. USITC Pub. 1994 at 23, 25. After examining the quotas under the self-restraint program and the nine companies with the largest fixed quotas, the Chairman and Vice Chairman did "not find it at all probable that the nine companies * * * will fill their shares of the 'fixed' quota with significantly increased amounts of L–WR pipe." *Id.* at 24. They explained that under the informal restraint agreement,

> in order for Taiwan exports of L–WR to rise to injurious levels, we would have to make several very speculative assumptions. Only if we were willing to assume that *all* producers with the capacity to produce L–WR pipes and tubes would fill their entire fixed quotas with L–WR pipe, successfully bid for the full 35 percent of the "free quota," *and* choose to fill their entire "free quota" with L–WR pipe * * * might the Taiwan exports rise to injurious levels. We are not willing to make such speculative assumptions. It would be speculation to say that merely because producers possess the capacity to produce L–WR, they will shift production into L–WR pipe and will fill their available quotas with only L–WR.

Id. at 24–25.

Plaintiffs assert the Chairman and Vice Chairman had no evidence which would support a conclusion that the self-restraint program would prevent substantial increases in Taiwanese L–WR imports that threatened material injury to the domestic industry because (1) the Commission did not know the fixed quota allocations of companies other than Yieh Hsing which exported L–WR to the United States, and (2) the Commission had no information as to what products these other firms manufactured. Plaintiffs argue that without such information it would be impossible to determine, given the unilateral and unenforceable nature of the program, whether the amounts of L–WR exported exceeded individual quota allotments. Plaintiffs also assert that the only evidence on the record shows that the self-restraint program would not prevent future increases in L–WR exports which would threaten the domestic industry with material injury, as shown by the increase in L–WR imports in the first quarter of 1987.

On the question of the increase in L–WR imports during the first quarter of 1987, the Chairman and Vice Chairman saw no reason to believe that it was anything other than a "one time occurrence." USITC Pub. 1994 at 25. They noted that Taiwanese L–WR exports remained at fairly stable levels even when expected to rise when no investigations were pending. *Id.* at 25. The record shows that except for 1985, when imports of Taiwanese L–WR were very low, the overall quantity of L–WR from Taiwan was virtually the same in 1984 and 1986. *Id.* At A–32. This history indicated to the Chairman and Vice Chairman that imports would continue generally at the same level. In addition, Yieh Hsing's export-import division manager had testified that the increase in imports between January and March 1987 had resulted from exporters rushing to get export certificates approved to beat Commerce's preliminary determination. R. 48 at 89. This observation is supported by a list showing a higher number of export certificates issued in November and December 1986 than in the first quarter of 1987. Conf. R. 16 at A–10. From this evidence the Chairman and Vice Chairman could reasonably conclude that

the increase in exports over the first quarter in 1987 was unlikely to recur.

The Chairman and Vice Chairman also found that the self-restraint program would prevent future increases in L–WR exports that would threaten material injury. They stated that only under a worst-case scenario that assumed production and export of only L–WR under the fixed quota and the full 35 percent allowed under the free quota "might" there be an increase in L–WR exports under the program sufficient to threaten the domestic industry with material injury. USITC Pub. 1994 at 24–25. The Chairman and Vice Chairman were unwilling to assume that such a worst-case scenario would occur because the program covered all steel products instead of just L–WR, and it was unreasonable to assume that Taiwanese firms would produce only L–WR even if they had the capacity to do so. *Id.*

The record shows five categories under the self-restraint program within which fifteen different steel products are mentioned: billets, coils, wire rod, bars and rods, angles, shapes, sections, sheets plates, hoop, strip, stainless steel, seamless pipes, wires, nails, and structures. R. 55 at 3; R. 60. Under the fixed quota, a producer may export any mix of steel products so long as its total production does not exceed its allotment. R. 48 at 88. The Commission's determination that an industry is threatened with material injury "may not be made on the basis of mere conjecture or supposition." 19 U.S.C. § 1677(7)(F)(ii) (Supp. IV 1986); *Citrosuco Paulista, S.A.* v. *United States,* 12 CIT ——, Slip Op. 88–176, at 55 (Dec. 30, 1988). Given the wide variety of products covered by the quota and the ability of firms to mix products exported under their respective allocations, it was reasonable for the Chairman and Vice Chairman to avoid speculation that firms would use their entire quota allocation to export only L–WR.

Nevertheless, plaintiffs assert that, in order to support their determination, it would be necessary for the Chairman and Vice Chairman to know the quota allotment of the firms that exported L–WR and whether those exports exceeded their quota allotments. The record lists nine Taiwanese companies with the largest shares of the fixed quota, of which Yieh Hsing has the fifth largest share. R. 60. Combined, these companies account for over half of the 18,000 short tons allowed under the fixed quota. *Id.* The record also contains a list, obtained from Commerce's SSSI file, of Taiwanese companies that had exported L–WR and the amounts in metric tons each exported from January 1986 through March 1987. Conf. R. 20. Although the Commission did not know the identity of every firm that might export L–WR or all the firm allocations under the fixed quota, the Commission did know the amounts of L–WR actually exported, and the maximum quota limits under the self-restraint program. R. 60; Conf. R. 20. Moreover, the Chairman and Vice Chairman found Taiwan is adhering to the quota and would likely extend

the program past 1987. USITC Pub. 1994 at 23 n.66. These findings are supported by information obtained from Commerce and USTR. R. 60 at 1–2.

It is not the Court's function to decide that it would have made another decision on the basis of the evidence. *Matsushita Elec. Indus. Co.* v. *United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984). The Court's role is to determine whether the Commission's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982); *Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 132, 744 F.2d 1556, 1559 (1984). The Chairman and Vice Chairman's conclusion that the self-restraint program would prevent surges that threatened material injury to the domestic industry is supported by substantial evidence on the record as a whole and is in accordance with law.

2. *Commissioner Lodwick's determination*

Unlike the Chairman and Vice Chairman, Commissioner Lodwick placed "little weight on Taiwan's unilateral restraint policy." USITC Pub. 1994 at 94. He noted, however, that Taiwanese producers need export licenses and that the volume of material licensed from September 1986 to April 1987 was below recent shipment sizes to the United States. *Id.* This observation reflects evidence in the record. Conf. R. 16 at A–10; Conf. R. 20. Because export licenses indicate the likely level of imports in the near future, these data led the Commissioner to find "no indication of a real and imminent sustainable increase in the position of Taiwan imports in the U.S. market which would lead to material injury to the domestic industry." USITC Pub. 1994 at 94. The statute provides that the evidence underlying an affirmative threat must be "real" and the threatened injury "imminent." 19 U.S.C. § 1677(7)(F)(ii) (Supp. IV 1986); *see American Spring Wire Corp.* v. *United States,* 8 CIT 20, 28 n.8, 590 F. Supp. 1273, 1281 n.8 (1984), *aff'd sub nom. Armco Inc.* v. *United States,* 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985). Accordingly, and for the reasons stated above, Commissioner Lodwick's determination is supported by the record as a whole and in accordance with law.

CONCLUSION

The majority views on threat of material injury are supported by substantial evidence on the record as a whole and according to law. The Court remands the causation of material injury portion of the Chairman and Vice Chairman's analysis to the Commission to determine whether the impact of less than fair value imports on sales of the domestic like product constitutes material injury. The Commission may evaluate whether a revenue loss of 4.1 percent of the 1986 L–WR shipments constitutes material injury or threat of material injury, or employ any other appropriate analysis which the Court can then review.

The Commission shall file its decision on remand within 30 days. Plaintiffs may file a response within 20 days after receipt of the Commission's remand determination. Defendants may reply within 10 days of receipt of the plaintiff's response.

(Slip Op. 89–33)

NEC ELECTRONICS U.S.A. INC. ELECTRONICS ARRAYS, DIV., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–05–00670

OPINION

[Defendant's motion to dismiss action granted.]

(Decided March 21, 1989)

Horton & Whiteley (Robert Scott Whiteley) for the plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Susan Handler-Menahem*) for the defendant.

AQUILINO, *Judge:* This action attempts to challenge U.S. Customs Service denial of a request for reliquidation pursuant to 19 U.S.C. § 1520(c)(1). The defendant has interposed an answer to the complaint and also a "Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, for Failure to State a Claim Upon Which Relief May be Granted".[1]

I

In its complaint, the plaintiff shows the merchandise at issue to be

> 32K ROM semiconductor devices consisting in part of semiconductor die of United States origin eligible for exemption from duty under item 807.00, TSUS * * * classified by customs under item 687.75 at a duty rate of 5.6% *ad valorem* including that portion of the merchandise eligible for classification under item 807.00 free of duty.[2]

The complaint further avers (in paragraph 11) that on September 30, 1981 a letter was sent to Customs, notifying the Service of an

> intention to make the claim for duty free treatment under item 807 based on the 64 cents per die U.S. content of all ROMs imported from NEC * * *.

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[1]While this caption appears to follow CIT Rule 12(b), in reality the motion is for judgment on the pleadings in accordance with Rule 12(c) which is treated as one for summary judgment thereunder due to presentment of matters outside those pleadings.

[2]Complaint, para. 5.

12. On April 8, 1983, within one year of the liquidation of the entries in question, a request for reliquidation under § 520(c)(1) of the Tariff Act of 1930 as amended, was timely filed.

13. That request for reliquidation was * * * denied on April 22, 1983. A * * * protest was filed contesting the denial of the claim under § 520(c) on July 21, 1983. Documentation proving the United States origin of the semiconductor die contained within the imported devices is available.

14. Documents required under § 10.24 of the customs regulations are also now available to substantiate the claim for duty free treatment of the simiconductor [*sic*] die under item 807.00 TSUS.

Defendant's answer essentially admits these allegations, but its motion sets forth the position that they do not add up to an actionable cause.

II

According to the summons, the entries at issue occurred in July and August 1981, with the date of liquidation shown to be April 9, 1982. In view of the passage of time indicated, defendant's motion attacks first the court's subject matter jurisdiction, but resolution of that question hinges on the nature of plaintiff's substantive claim, which the motion characterizes (at page 3) as an

> attempt[ ] to use a section 520(c)(1) claim to contest the classification of the imported merchandise when its time to file such a claim pursuant to 19 U.S.C. § 1514 had elapsed. The law is well settled that an attempt to contest the classification of merchandise is an error of law and is not cognizable under section 520(c)(1).

That section provides that, notwithstanding nonfiling of a valid protest,

> the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction.

The section is not considered an alternative to a liquidation/protest review under 19 U.S.C. § 1514, and its application is limited to the above circumstances. *See, e.g., Phillips Petroleum Co.* v. *United States,* 55 CCPA 7, 11, C.A.D. 893 (1966). In *Concentric Pumps, Ltd.* v. *United States,* 10 CIT 505, 508, 643 F. Supp. 623, 625 (1986), the court reviewed the remedial nature of section 1520 and concluded that it

is not directed at rectifying allegedly incorrect interpretations of law. *Computime, Inc.* v. *United States,* 9 CIT 553, 622 F. Supp. 1083, 1085 (1985); *see also, Hambro Automotive Corporation* v. *United States,* 66 CCPA 113, 120, C.A.D. 1231, 603 F.2d 850, 855 (1979). Determinations by the Customs Service that merchandise is covered by a certain provision of the TSUS are conclusions of law. *See Mattel, Inc.* v. *United States,* 72 Cust. Ct. 257, 262, C.D. 4547, 377 F. Supp. 955, 960 (1974). Therefore, barring mistake of fact, an erroneous classification would render § 520(c)(1) inapplicable. *Id.* at 262, 377 F. Supp. at 960. In that event plaintiff would be limited to seeking relief under § 514 of the Tariff Act of 1930, 19 U.S.C. § 1514, which sets forth the appropriate procedure to protest a misinterpretation of the applicable law and an improper classification by the Customs Service.

Defendant's motion therefore turns on whether plaintiff's failure to seek preferential treatment under item 807 prior to liquidation, under section 1514 or otherwise, may be remedied now under section 1520 on the ground of clerical error, mistake of fact, or other inadvertence.

Clerical error appears to be of no moment herein; the focus of plaintiff's brief is mistake of fact or inadvertence. A mistake of fact exists when "a person understands the facts to be other than they are"[3] or "when some fact which indeed exists, is unknown, or a fact which is thought to exist, in reality does not exist." *Concentric Pumps, Ltd.* v. *United States,* 10 CIT at 508, 643 F. Supp. at 625 (citations omitted). Inadvertence "has been defined variously as an oversight or involuntary accident, or the result of inattention or carelessness, and even as a type of mistake." *Hambro Automotive Corp.* v. *United States,* 603 F.2d 850, 854 (CCPA 1979) (citations omitted).

In *C.J. Tower & Sons* v. *United States,* 68 Cust. Ct. 17, C.D. 4327, 336 F. Supp. 1395 (1972), *aff'd,* 499 F.2d 1277 (CCPA 1974), the imported articles entered the country under item 694.60, TSUS. Liquidation occurred, with no section 1514 protest filed. Later, the plaintiff requested reliquidation under section 1520(c)(1), alleging that the merchandise had been imported for the military as emergency war materiel and thus duty-free under item 832.00, TSUS. Customs denied the request, and a protest was filed thereafter. The Customs Court considered whether the plaintiff's failure to request preferential treatment under item 832.00 via a section 1514 protest could be remedied by a section 1520 action grounded on mistake of fact or inadvertence. The court held for the plaintiff as a result of a concession that neither the Service nor the importer had been aware of the presence of duty-free merchandise until after the period for filing a protest of the liquidation had expired. The court concluded that the mutual "lack of knowledge, both in kind and degree, [wa]s such as to clearly come within the statutory language, 'mistake of

[3] *Hambro Automotive Corp.* v. *United States,* 603 F.2d 850, 854 (CCPA 1979) (citing 58 C.J.S. *Mistake,* p. 832).

fact, or other inadvertence.' " 68 Cust. Ct. at 22, 336 F. Supp. at 1399.

In *Concentric Pumps, Ltd.* v. *United States,* the court concluded that the plaintiff's ignorance of the tariff schedule did not constitute a mistake of fact or other inadvertence. In rejecting the request for reliquidation pursuant to section 1520(c)(1), the court stated that,

> [w]here the importer knew the nature of its goods, but was not aware of a duty free item listed in the Tariff Schedule, no other conclusion can be drawn but that no mistake of fact was involved * * *. [P]laintiff's mistake is not one of fact, but one of law.

In the action at bar, it is apparent that plaintiff's representative had actual knowledge of the nature of the goods, as well as the existence of item 807, prior to the expiration of the liquidation/protest period. Such knowledge distinguishes the instant matter from *C.J. Tower*[4] and also puts the plaintiff in an even weaker position than its counterpart in *Concentric Pumps.* In short, the plaintiff has no remedy under 19 U.S.C. § 1520(c)(1).

A regulation, 19 C.F.R. § 10.112, permits filing "at any time prior to liquidation * * * or * * * before the liquidation becomes final" of entry-free or reduced-duty documents, in this action in accordance with item 807 and 19 C.F.R. § 10.24. The plaintiff argues its reliquidation request was denied because it failed to file those required documents. The plaintiff is now willing to submit them and concludes that its "520(c)(1) claim and supporting documents may be filed with the * * * Court if the filing complies with 19 C.F.R. 10.112, viz. there is a showing that the late filing has not been due to 'willful negligence or fraud.' " Plaintiff's Brief at 7 (citation omitted).

Had the plaintiff secured this court's jurisdiction through a timely section 1514 action, or if it now made out a case under section 1520(c)(1), then its willingness to submit the requisite documentation could remedy the lack thereof to date. But section 10.112 cannot extend the court's jurisdiction. *See, e.g., Audiovox Corp.* v. *United States,* 8 CIT 233, 236, 598 F. Supp. 387, 389 (1984), *aff'd,* 764 F.2d 848 (Fed. Cir. 1985). Otherwise, the statutory process pursuant to 19 U.S.C. § 1514 would be circumvented.

III

Jurisdiction via 28 U.S.C. § 1581(a) is predicated upon a valid section 1514 protest. In the absence of such a protest here, the court has no jurisdiction. As the court in *Audiovox Corp.* stated, "[s]ince plaintiff did not act diligently to pursue and exhaust its administra-

[4]Plaintiff's argument that, at the time of importation, neither it nor Customs had knowledge that the semiconductors contained die of United States origin is of no avail. Both sides possessed this information many months before liquidation, which took place on April 9, 1982, and the plaintiff thus had ample time to properly contest the classification. *See, e.g.,* letter from Tom McDannold, Vice President, Electronic Arrays, Inc. to Steven Bevans, Import Specialist, United States Customs Service (Sept. 30, 1981).

tive remedies under 19 U.S.C. § 1514, the Court will not exercise its subject matter jurisdiction under § 1581(i)." 8 CIT at 236–37, 598 F. Supp. at 390 (citation omitted).

Judgment will enter accordingly.

(Slip Op. 89–34)

RHONE POULENC, INC. AND RHONE POULENC CHIMIE DE BASE S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND PQ CORP., DEFENDANT-INTERVENOR

Court No. 88–03–00198

Commerce may require respondents who maintain relevant business information in a computerized data base to make their submissions on computer tape, and that Commerce may apply the best information otherwise available when a respondent refuses to supply information in the requested format and when the information provided is deficient. Where the most recent data is based on only a small number of sales or is otherwise not representative, the "best information otherwise available" rule does not necessarily require Commerce to use only the most recent information available. Plaintiffs did not raise timely objections to Commerce's failure to adjust the dumping margin to reflect fluctuations in the interest rate and exchange rate of the French franc.

[Judgment for defendant.]

(Decided March 21, 1989)

Donohue and Donohue (*James A. Geraghty*) for plaintiffs.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, United States Department of Justice (*M. Martha Ries*); Office of the Chief Counsel for International Trade, United States Department of Commerce (*Craig L. Jackson*) for defendant.

Sosnov & Sosnov (*Steven R. Sosnov*) for defendant-intervenor.

DICARLO, *Judge:* Pursuant to Rule 56.1 of the Rules of this Court, Rhone Poulenc, Inc. and Rhone Poulence Chimie de Base, S.A. (plaintiffs) challenge the final determination under 19 U.S.C. § 1675(a) (1982 & Supp. IV 1986) of the International Trade Administration of the United States Department of Commerce (Commerce) in the 1984 administrative review of the antidumping duty order entered on anhydrous sodium metasilicate (ASM) from France. *Anhydrous Sodium Metasilicate From France; Final Results of Antidumping Duty Administrative Review,* 53 Fed. Reg. 4195 (Feb. 12, 1988).

The Court has jurisdiction under 28 U.S.C. § 1518(c) (1982). The Court finds that Commerce may require respondents who maintain their relevant business information in a computerized data base to make their submissions on computer tape, and that Commerce may apply the best information otherwise available when a respondent refuses to supply information in the requested form and where the information provided is deficient. The Court holds that where the most recent information is based on only a small number of sales or

is otherwise not representative, the best information otherwise available may not necessarily be the most recent data available. The Court also finds that the plaintiffs did not raise timely objections to Commerce's failure to adjust the dumping margin to reflect fluctuations in the interest rate and exchange rate of the French franc.

BACKGROUND

Plaintiffs are the sole French producer and importer of ASM, a sodium silicate compound sold in a variety of grades for use in waste paper de-inking, cleaning processes, bleach stabilization or floatation, and clay processing. R. 12 at 4.

Commerce found that French ASM was being sold in the United States at a less than fair value sales margin of 60 percent, and the United States International Trade Commission found material injury to a domestic industry by reason of the dumped imports. *Anhydrous Sodium Metasilicate From France; Antidumping Duty Order,* 46 Fed. Reg. 1667 (Jan. 7, 1981). Over the course of the first four administrative reviews of the antidumping duty order, Commerce found only two shipments of French ASM between November 1, 1980 and December 31, 1983, which it determined were not sold at less than fair value. *Anhydrous Sodium Metasilicate From France; Final Results of Administrative Review of Antidumping Duty Order,* 49 Fed. Reg. 43,733 (Oct. 31, 1984); *Anhydrous Sodium Metasilicate From France; Final Results of Antidumping Duty Administrative Review,* 53 Fed. Reg. 4195 (Feb. 12, 1988). In the administrative review covering 1984 (1984 review), Commerce applied, as the best information otherwise available, the 60 percent dumping margin from the original investigation in 1980, after rejecting plaintiffs' submissions as inadequate and for being in a format other than that requested. The review covering 1985 is the subject of a separate action.

DISCUSSION

Plaintiffs assert Commerce's final determination in the 1984 review was contrary to law because (1) Commerce abused its discretion in rejecting plaintiffs' submission *in toto* and applying the best information otherwise available rule as a punitive measure, (2) Commerce lacks authority to require that respondents submit information on computer tape, (3) assuming plaintiff's submission was deficient, Commerce should have used the data from the most recent administrative reviews as the best information otherwise available rather than only the 1980 data, and (4) Commerce did not adjust the dumping margin to reflect fluctuations in the exchange rate of the French franc and interest rates between 1980 and 1984.

In reviewing challenges to administrative reviews, the Court is to sustain Commerce's determination unless it is found to be "unsupported by substantial evidence on the record or otherwise not in ac-

cordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982); *Matsushita Elec. Indus. Co.* v. *United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984); *Fuji Elec. Co.* v. *United States*, 12 CIT ——, 689 F. Supp. 1217, 1221 (1988).

A. *Best Information Otherwise Available*

In reaching its determination, Commerce rejected plaintiffs' entire submission and used the dumping margin from the original antidumping investigation as the best information otherwise available because plaintiffs' submission was not in the required format and plaintiffs did not provide certain requested data.

Plaintiffs contend that they cooperated fully with Commerce and submitted complete data sufficient to cover every element necessary for a less than fair value calculation. Accordingly, plaintiffs argue Commerce improperly rejected their submission and applied the best information rule against them.

In making its determination in an antidumping investigation, Commerce is directed to use the "best information otherwise available" "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation * * *." 19 U.S.C. § 1677e(b) (1982). *See Atlantic Sugar, Ltd.* v. *United States*, 2 Fed. Cir. (T) 130, 133, 744 F.2d 1556, 1560 (1984); *U.H.F.C. Co.* v. *United States*, 13 CIT ——, Slip Op. 89–19 at 19 (Feb. 14, 1989).

The first reason Commerce stated for rejecting plaintiffs' submissions is that transaction data were not on computer tape as Commerce had requested several times. Plaintiffs counter that because Commerce's regulations mention only written submissions, Commerce may not require respondents to submit their data on computer tape.

19 C.F.R. § 353.46(a)(2) (1988) covers submissions in Commerce investigations. While the regulation details procedures to be utilized only as to document submissions, it does not limit submissions to this form alone. Therefore, there is no conflict between the regulation and the additional requirement.

Commerce changed its submission format policy to facilitate the complex analysis necessary to make a determination. The court has already recognized that the complexity of antidumping investigations may necessitate use of computer tapes. *See, e.g., American Brass* v. *United States*, 12 CIT ——, 699 F. Supp. 934, 937 (1988); *Timken Co.* v. *United States*, 11 CIT ——, 659 F. Supp. 239, 242 (1987). Considering the complexity of antidumping investigations and administrative reviews of antidumping duty orders, it is not unreasonable for Commerce to insist that those respondents who maintain a computerized data base for their business data submit the information requested in a form that would facilitate Com-

merce's investigation, unless it would be an unreasonable burden to produce the information on computer tape.

Commerce gave plaintiffs instructions on how to (a) submit computer tapes in a form compatible with Commerce's computer system, and (b) provide documentation of the contents and location of data on the tapes. R. 4, Appendix III. Commerce informed plaintiffs that failure to provide the information as requested would subject them to the best information otherwise available rule. R. 4, General Instructions, at 1. Plaintiffs admit that they maintain the information sought in a computerized data base. Rather than submit computer tapes or request an exemption from the requirement, plaintiffs stated only that their computer software "does not permit retrieval in a form or manner suitable for antidumping margin analyses." R. 15 at 4. Plaintiffs also admit that the data they submitted "might not have been in the most convenient to use format for purposes of an antidumping analysis * * *." *Plaintiffs' Brief in Support of Motion for Summary Judgment,* at 7.

Commerce also rejected plaintiffs' submission because (1) home market sales dates were not provided, (2) United States selling expenses were not adequately identified or quantified, (3) home-market selling expenses were not specific, and (4) documentation of plaintiffs' packing and inland freight costs was insufficient.

Plaintiffs argue that missing home-market sales dates is a "bogus issue" because Commerce could have chosen whatever operative date it wished as the date of sale. In this case, plaintiffs argue that home market sales dates are the same as the shipment dates stated in their submission. *Plaintiffs' Brief in Support of Motion for Summary Judgment,* at 6–7. The only reference in plaintiffs' submission pertaining to a home-market sale is a column entitled DATEXP, which is defined as the date of shipment. Conf. R. 3, Section B.

Commerce counters that determining the date of sale is not simply a matter of picking any date as plaintiffs suggest, but requires much more explanatory information than plaintiffs supplied. The date of sale is an important factor in an administrative review of an antidumping duty order because it allows Commerce to match the home-market sale with the United States sale in order to compare prices within the proper review period. There is no indication whether the sales contracts in question were entered into before or at the time of shipment. Commerce found that plaintiffs' submission does not provide any information to determine whether the date of shipment is the date on which the sale was actually made.

As justification for not providing more detailed information on sales dates in the 1984 review, plaintiffs cite a document contained in the record of the 1985 administrative review of the ASM antidumping duty order. Judicial review of an administrative review of an antidumping duty order is confined to information contained in the administrative record. 19 U.S.C. § 1516a(b) (1982). Plaintiffs generally may not supplement the record before the Court with in-

formation contained in the record of a separate administrative review arising out of the same antidumping duty order. *Beker Indus. Corp.* v. *United States,* 7 CIT 313, 317 (1984); *see also Bethlehem Steel Corp.* v. *United States,* 5 CIT 236, 236, 566 F. Supp. 346, 347 (1983); *PPG Indus., Inc.* v. *United States,* 5 CIT 282, 284 (1983); *Melamine Chem. Inc.* v. *United States,* 2 CIT 113, 116 (1981); *Nakajima All Co.* v. *United States,* 2 CIT 25, 26 (1981).

Contrary to Commerce's allegation that United States selling expenses were not adequately identified or quantified, plaintiffs contend that their United States selling expense information was "as specific as it is possible to be." *Plaintiffs' Memorandum in Support of Motion for Judgment on Agency Record* at 7. The record shows, however, that (1) plaintiffs' data were enumerated as "operating expenses for various chemicals" with no specification whether these expenses were for ASM or other chemicals sold in the United States; (2) plaintiffs provided no detail on their distribution, selling, advertising, technical and development, or general and administrative expenses which would allow Commerce to determine whether the referenced expenses were direct or indirect expenses; and (3) plaintiffs provided no worksheet as requested on how the amounts of each direct or indirect expense were calculated. Conf. R. 2; R. 4, General Instructions, at 1.

Plaintiffs also dispute Commerce's claim that their home-market selling expenses were not specific. Plaintiffs claim that the expenses are listed in their RN 15 statement contained in the record. Conf. R. 3. Plaintiffs' RN 15 statement is, however, in French without the benefit of an English translation. Moreover, plaintiffs' supplemental profit and loss statements allegedly detailing indirect selling expenses were also in French with only the subheadings in the vertical but not horizontal columns translated into English. Conf. R. 2. Commerce's regulations require that all responses to requests for information must be in English, and failure to do so may subject the respondent to the best information otherwise available rule. 19 C.F.R. § 353.51(d) (1988). *See also* H.R. Doc. No. 153 Part II, 96th Cong., 1st Sess. 435, *reprinted in* 1979 U.S. Code Cong. & Admin. News 665, 700 (statements of administrative action providing that "the Authority may require English language translations of all material documents"). Additionally, the figures in the RN 15 statement are annual averages and there is no supporting documentation on how these averages were calculated. Conf. R. 3. Commerce states that average figures are insufficiently specific to permit comparison of home market and United States sales on a sale-by-sale basis. Plaintiffs also did not explain what constitutes a commercial or technical expense or how the selling expenses were allocated to sales of ASM.

The record supports Commerce's conclusion that the information was, for the most part, in French with no English translation, that provision of an average figure for claimed home market selling ex-

penses was inadequate, and that there was no explanation of the method of allocation. Moreover, although Commerce had granted plaintiffs an extension of time until January 16, 1987 to file their submission, plaintiffs did not provide their home-market sales information until May 13, 1987.

Finally, as to their alleged failure to substantiate packing and inland freight costs, plaintiffs counter that there is more than one way to allocate these costs and that Commerce had the discretion to use any appropriate methodology. In their submission, plaintiffs reported an average inland freight and packing expense despite its statement that the packing expense differed on a sale by sale basis depending on how the merchandise was packaged.

Plaintiffs concede that their packing differs on a per-sale basis. Nevertheless, plaintiffs did not submit information on each sale in order to substantiate this claim, but provided an unsubstantiated average figure derived from its RN 15 statement. Not only was this statement in French, but Commerce states that the average figure did not permit it to compare home market and United States sales accurately on a sale-by-sale basis. Nor is there any explanation on how the packing costs vary when ASM is sold in bulk rather than in bags.

The record supports Commerce's claim that it had difficulty in ascertaining the validity of plaintiffs' claimed expenses, and on the basis of the data submitted, it was unable to make a choice of methodology. The record shows that plaintiffs' submission was not in the form required by Commerce, and it provides sufficient evidence that the submission was unresponsive and deficient. The statute permits Commerce to use the best information rule when a respondent does not timely produce the information requested in the form required. 19 U.S.C. § 1677e(b) (1982); *Atlantic Sugar*, 2 Fed. Cir. (T) at 133, 744 F.2d at 1560; *Hercules, Inc.* v. *United States*, 11 CIT ——, 673 F. Supp. 454, 471 (1987).

Plaintiffs argue that Commerce should not have rejected their submission *in toto* but should have applied the best information rule as to only missing information. In employing the best information available rule against an uncooperative respondent, Commerce may "disregard information submitted by the party for the relevant period and use information, pursuant to [19 U.S.C.] § 1677e(b), which may actually be less accurate, if it is the best information otherwise available." *Uddeholm Corp.* v. *United States*, 11 CIT ——, 676 F. Supp. 1234, 1236 (1987); *see also Ceramica Regiomontana, S.A.* v. *United States*, 10 CIT 399, 406, 636 F. Supp. 961, 967, *aff'd*, 810 F.2d 1137 (1986) (upholding Commerce's rejection of information submitted in an administrative review of a countervailing duty order, even though some of the information had not been proven inaccurate).

The Court is unpersuaded by plaintiffs' argument for the adoption of a rule prohibiting Commerce from rejecting any submission that is "substantially complete." Such a substantiality test might place control of the results of an administrative review in the hands of respondents by permitting them selectively to provide information requested. *See Pistachio Group of the Ass'n of Food Indus.* v. *United States,* 11 CIT ——, 671 F. Supp. 31, 40 (1987). Commerce's rejection of plaintiffs' submission and use of the best information otherwise available rule is supported by the administrative record and is in accordance with law.

B. *Most Recent Data*

Plaintiffs also argue that, even if Commerce was justified in using the best information available rule in the 1984 review, the data used from the original investigation in 1980, and specifically the dumping margin, were stale and not the best information available. Plaintiffs assert that if their responses are deficient in some respect, Commerce must use the data from the two most recent administrative reviews as the most up-to-date information available.

Plaintiffs' arguments are unpersuasive. Once Commerce has exercised its discretion to use the best information available rule against a respondent, it is for Commerce, not the respondent, to determine what is the best information. *Ansaldo Componenti S.p.A.* v. *United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). There is no mention in the statute or regulations that the best information available is the most recent information collected. *See* 19 U.S.C § 1677e(b) (1982); 19 C.F.R. § 353.51 (1988).

Plaintiffs' argue that according to *Freeport Minerals Co.* v. *United States,* 4 Fed. Cir. (T) 16, 776 F.2d 1029 (1985), and *Timken Co.* v. *United States,* 10 CIT 86, 92, 630 F. Supp. 1327, 1333 (1986), Commerce must use the most recent information available. Both *Freeport Minerals* and *Timken* involved the question of what periods Commerce should review in considering requests to revoke outstanding antidumping duty orders. In this case, Commerce reviewed the relevant period and used the best information rule when plaintiffs failed to submit sufficient information pertaining to the relevant period. The concern in revocation cases is distinct from that in best information cases where a respondent has not provided adequate information. In best information cases the question is what is the best information available, not what is the most recent. Thus, where the most recent data is based on only a small number of sales or is otherwise not representative data, there is no requirement that Commerce always use information from the most recent administrative reviews as the best information available. *See Ansaldo Componeti,* 10 CIT at 38, 628 F. Supp. at 206 (upholding Commerce's use of information from the original less than fair value investigation as the best information available in an administrative review).

The Court also rejects plaintiffs' arguments for the additional reason that the best information rule is designed to prevent a respondent from controlling the results of an administrative review by providing partial information or by delaying or hindering the review. *See Pistachio Group of the Ass'n of Food Indus.* v. *United States,* 11 CIT ——, 671 F. Supp. 31, 40 (1987). The best information rule may be used as a means to ensure full cooperation from a recalcitrant respondent. *Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 134, 744 F.2d 1556, 1560 (1984). Commerce rejected the information gathered in the previous two reviews because to use it would reward plaintiffs for their lack of cooperation by erasing a 60 percent dumping margin on the basis of one sale over a two-year period. To force Commerce to use the data from the later reviews instead of the data from the original investigation might hinder Commerce in obtaining full cooperation by parties in an investigation and might place control of the investigation in the hands of uncooperative respondents who could force Commerce to use possibly unrepresentative information most beneficial to them.

Commerce's use of the 1980 dumping margin is also consistent with prior administrative practice. Commerce's position on use of the best information rule is that:

> Unless the facts of a case indicate otherwise, the Department generally uses for best information available for a non-responsive firm the higher of (1) that firm's prior rate, or (2) the highest rate for any responsive firm during the period of review. Thus * * * there is an incentive for a firm with an initial low rate to cooperate in future antidumping annual reviews.

Final Results of Antidumping Duty Administrative Review; Neoprene Laminate from Japan, 52 Fed. Reg. 36,295 (Sept. 28, 1987); *see also Portable Electric Typewriters from Japan,* 53 Fed. Reg. 20,353, 20,354 (June 3, 1988). Commerce has also stated that "[n]owhere in the statute or regulations does it state that the Department must rely upon the 'most recently lawfully determined margin' for a firm * * * in a subsequent review." *Malleable Cast-Iron Pipe Fittings, Other than Grooved, from Taiwan; Final Results of Antidumping Duty Administrative Review,* 53 Fed. Reg. 16,179, 16,180 (May 5, 1988). These views are consistent with the use of the best information available rule under 19 U.S.C. § 1677e(b) to elicit the fullest cooperation from parties in an investigation by Commerce.

Commerce's use of the data from the original antidumping investigation rather than the data from the previous administrative reviews is supported by the administrative record and is according to law.

C. *Dumping Margin Adjustments*

To compare prices in the home market and the United States market in 1984, Commerce converted the home market data into dollars at the 1980 rate of exchange. Commerce also did not consid-

er interest rate changes over the intervening period. Plaintiffs claim Commerce should have adjusted the dumping margin in the 1984 review to account for fluctuations in the interest rate and exchange rate of the French franc since entry of the original antidumping order. Commerce counters that plaintiffs failed to raise this issue during the administrative proceedings.

Plaintiffs had the opportunity to raise these points in their comments on Commerce's preliminary results in the review, but for "tactical" reasons failed to do so. R. 15. Administrative exhaustion of remedies is generally required before a litigant will be allowed to raise a claim via a civil action. *See* 28 U.S.C. § 2637(d) (1982); *Sharp Corp* v. *United States,* 837 F.2d 1058 (Fed. Cir. 1988); *Alhambra Foundry Co.* v. *United States,* 12 CIT ——, 685 F. Supp. 1252, 1256 (1988); Cameron & Polino, *The Impact of the Court on ITA Policies and Procedures—Too Much or Too Little?,* 10 B.C. Int'l Comp. L. Rev. 241, 242–50 (1987) (application of the doctrine of exhaustion of remedies in the Court of International Trade). "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *United States* v. *L.A. Tucker Truck Lines,* 344 U.S. 33, 37 (1952); *see Unemployment Compensation Comm'n of Alaska* v. *Aragon,* 329 U.S. 143, 155 (1946); *Kokusai Elec. Co.* v. *United States,* 10 CIT 166, 171, 632 F. Supp. 23, 29 (1986).

Plaintiffs have not provided a sufficient reason for not raising the issue at the administrative level. There being no mistake or oversight by any of the parties nor any exceptions to the exhaustion doctrine that apply here, the Court finds that plaintiffs have failed to exhaust their administrative remedies and should be precluded from raising for the first time in this Court the issue of whether Commerce should have adjusted the dumping margin for fluctuations in the interest rate and exchange rate of the French franc.

Conclusion

Commerce's determination in the 1984 administrative review of the antidumping duty order entered on ASM from France is supported by substantial evidence on the record and is in accordance with law. This action is dismissed.

(Slip Op. 89–35)

SEATTLE MARINE FISHING SUPPLY CO., NORDBY SUPPLY CO., REDDEN NET CO., FISHERIES SUPPLY CO., LUMMI FISHERIES SUPPLY CO., NETS, INC., TACOMA MARINE SUPPLY, ASTORIA MARINE SUPPLY, AND ENGLUND MARINE SUPPLY, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 83–10–01552

MEMORANDUM OPINION

Plaintiffs move for reassignment of this action from the assigned judge to a three-judge panel pursuant to Rule 77(e)(2) of the rules of this court, on the grounds that this action raises an issue as to the constitutionality of an Act of Congress, and for oral argument of the motion under Rule 7(c).

Held: Reassignment to a three-judge panel after a decision by a single-judge court is not precluded as a matter of law. Under the circumstances of this case, however, the action will not be reassigned, as an appeal has been filed in the Court of Appeals for the Federal Circuit and the action will be properly and expeditiously resolved in that court.

[Plaintiffs' motions are denied.]

(Dated March 22, 1989)

Law Offices of George R. Tuttle, P.C. (*George R. Tuttle*), for plaintiffs.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Elizabeth C. Seastrum*), for defendant.

RE, *Chief Judge:* Pursuant to the provisions of 28 U.S.C. § 255(a) (1982), and Rule 77(e)(2) of the Rules of the United States Court of International Trade, plaintiffs move before the chief judge for the reassignment of this action, presently assigned to a single judge, to a three-judge panel. Plaintiffs also move for oral argument of this motion under rule 7(c).

The question presented is whether, pursuant to the authority conferred by statute, the chief judge may reassign this case to a three-judge panel after the judge to whom the case was assigned has rendered a final decision and the plaintiffs have filed an appeal with the appellate court. Since this case is now properly before the Court of Appeals for the Federal Circuit, plaintiffs' motions are denied.

Plaintiffs, United States importers of fish netting, challenged a final determination by the International Trade Administration (ITA), 48 Fed. Reg. 43210 (1983), following the ITA's administrative review of certain dumping findings of fish netting of manmade fibers from Japan, 37 Fed. Reg. 11560 (1972). Pursuant to Rule 56.1, plaintiffs sought judicial review of the ITA's final determination on the grounds that it was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence on the record, or otherwise not in accordance with law.

Pursuant to 28 U.S.C. § 253(c) this action was assigned to a single judge of this court. On January 26, 1988, the assigned judge sustained the ITA's determination, and dismissed plaintiffs' motion for

judgment on the agency record. *See Seattle Marine Fishing Supply Co.* v. *United States*, 12 CIT ——, 679 F. Supp. 1119, 1121 (1988).

On February 25, 1988 plaintiffs filed a motion for rehearing of this court's decision of January 26, 1988, which was subsequently denied by the assigned judge. On May 31, 1988, plaintiffs moved to vacate and reconsider the court's decision, and for oral argument. While that motion was pending, on June 27, 1988, plaintiffs filed an appeal to the Court of Appeals for the Federal Circuit (CAFC) from the court's denial of their motion for rehearing of the court's original decision and judgment. On July 12, 1988, this court suspended plaintiffs' motion to vacate and reconsider its decision pending a determination on the appeal by the CAFC.

On July 29, 1988, plaintiffs moved before the CAFC to suspend its appeal in order to remand the case to this court to decide the motion to vacate and reconsider. The CAFC granted the motion and remanded the case. On January 5, 1989, plaintiffs' motion to vacate, reconsider and for oral argument was denied by order of this court. On January 24, 1989, the case was restored to the docket of the CAFC.

On December 2, 1988 plaintiffs filed a motion for a three-judge panel challenging the constitutionality of 19 U.S.C. § 1677e, 19 C.F.R. § 353.51 and the established procedures under 19 U.S.C. § 1675(a) on the grounds that the laws violate the procedural due process clause of the fifth amendment. Plaintiffs contend that these sections "fail to require adequate notice to the importer of record or the exporter that the exporter's failure to respond on a timely basis or in an adequate matter will, in the absence of special circumstances, result in the assessment of penal dumping duties based upon the 'best information otherwise available.' " Plaintiffs contend that the assessment of "penal" dumping duties based on the "best information available" without adequate notice to the importer and exporter violates procedural due process requirements of the fifth amendment which protects liberty and property interests from unjustifiable impairment or abridgment.

Defendant opposes plaintiffs' motion for reassignment of this action to a three-judge panel on the ground that the motion is without merit. In a supplemental brief, defendant also contends that this court lacks jurisdiction over this motion because the case is pending on appeal before the CAFC.

Subsequently, on February 9, 1989, plaintiffs filed a motion with the CAFC "to staly appeal pending decision on motion for rehearing of the motion to vacate and reconsider and the motion for reassignment to three-judge panel." On March 8, 1989, the CAFC denied plaintiff's motion for a stay and a remand to the CIT.

DISCUSSION

The authority of the chief judge of this court to designate a three-judge panel of the court to hear and determine a case is found in Title 28 U.S.C. §§ 253(c), 255(a) (1982).

Section 253(c) of Title 28 provides:

> The chief judge, under rules of the court, may designate any judge or judges of the court to try any case, and when the circumstances so warrant, reassign the case to another judge or judges.

28 U.S.C. § 253(c).

Section 255 provides:

> (a) Upon application of any party to a civil action or upon his own initiative, the chief judge of the Court of International Trade shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

28 U.S.C. § 255(a).

These statutory provisions are implemented by Rule 77(e) of the rules of the court, which provides in pertinent part:

> (2) Assignment to Three-Judge Panel. An action may be assigned by the chief judge to a three-judge panel either upon motion, or upon his own initiative, when the chief judge finds that the action raises an issue of the constitutionality of an Act of Congress, a proclamation of the President, or an Executive order; or has broad and significant implications in the administration or interpretation of the law.
>
> * * * * * * *
>
> (4) Reassignment. An action may be reassigned by the chief judge upon the death, resignation, retirement, illness or disqualification of the judge to whom it was assigned, or upon other special circumstances warranting reassignment.

USCIT Rule 77(e)(2), (4).

Section 254 of Title 28 specifies that, except as otherwise provided in 28 U.S.C. § 255, the judicial power of this court shall be exercised by a single judge. 28 U.S.C. § 254 (1982). In an exceptional case of constitutional or other broad significance, however, the chief judge may appoint a three-judge panel to hear and resolve the case. 28 U.S.C. § 255 (1982). It is clear that the decision to designate a three-judge panel lies within the sound discretion of the chief judge. *See Fundicao Tupy S.A.* v. *United States,* 11 CIT ——, 652 F. Supp. 1538, 1540–41 (1987); *see also Washington Int'l Ins. Co.* v. *United States,* 11 CIT ——, 659 F. Supp. 235, 236 (1987).

The opinion in *National Corn Growers Ass'n* v. *Baker,* 10 CIT 517, 643 F. Supp. 626 (1986), is instructive on the exercise of the discretionary authority of the chief judge to reassign a case to a three-judge panel. In that case, the defendant-intervenor moved before the chief judge for reassignment of that case to a three-judge panel to rehear the decision of a single-court judge. The chief judge concluded that reassignment to a three-judge panel would not "aid in the expeditious disposition of the action" and denied the motion. 10 CIT at 523–24, 643 F. Supp. at 632. In that case, the chief judge stated that,

> motions for reassignment to a three-judge panel, made after the case has been assigned to a single judge, will be viewed with disfavor. Motions for reassignment made after a single judge has rendered a decision face an even heavier burden. Certainly, the chief judge will not allow any party to engage in what may appear to be "judge shopping."

10 CIT at 522, 643 F. Supp. at 631.

It is evident that plaintiffs are dissatisfied with the decision of the judge to whom the case was assigned, and the denial of its motion for rehearing. Hence, the relief sought by plaintiffs by this motion is to have the chief judge review, as though on appeal, a final decision of another judge of this court. A motion to reassign, however, is not the proper procedural method to achieve the relief sought by plaintiffs. *See Roses, Inc.* v. *United States,* 12 CIT ——, 682 F. Supp. 577, 580 (1988).

In *Roses* the question presented was whether the statutory reassignment authority conferred upon the chief judge should be exercised to permit an intracourt appeal from the final decision of the assigned judge. 682 F. Supp. at 580. In that case plaintiff moved before the chief judge for orders reassigning five actions from the assigned judge, and for orders setting aside the orders of dismissal issued by the assigned judge. The *Roses* case held that the statutory authority of the chief judge to reassign a case should not be exercised after the assigned judge "has rendered a final decision * * *." Hence, plaintiff's motion was denied. *Id.* at 583.

The *Roses* case stated that, "the statutory responsibility of the chief judge to reassign cases does not include the expressed or implied authority to permit intracourt appeals from the final decisions of another judge of this court." *Id.* at 581. The "normal and proper procedure" to be pursued by plaintiffs to correct the errors they allege is an appeal to the appropriate appellate court. *Id.* Surely, the chief judge should not interfere with the independence of any judge in the performance of judicial duties by reassigning a case after a judge has rendered a final decision. *See id.* at 583.

In this case, plaintiffs filed an appeal with the CAFC. The case was restored to that court's docket after plaintiffs' motion to vacate and reconsider was denied by the assigned judge of this court. On March 8, 1989 the CAFC denied plaintiffs' motion for a stay of the

appeal, and a remand to this court. Although the CAFC did not decide the jurisdictional question raised by plaintiffs' motion for reassignment to a three-judge panel, it is evident that the CAFC will now hear plaintiffs' appeal from the denial of its motion for a rehearing. It is clear, therefore, that this case is now properly before the CAFC.

Without expressing any view on the jurisdictional question presented, it is the conclusion of this court that a motion to reassign to a three-judge panel is not the proper procedure to achieve the ultimate relief sought by plaintiffs. It is also clear that no purpose would have been served by oral argument of this motion.

Accordingly, it is

ORDERED that plaintiffs' motion for reassignment to a three-judge panel and for oral argument of the motion is denied.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED Item No. and
C89/29	DiCarlo, J. March 6, 1989	Famous Raincoat Co.	86–4–00515	Item 380.04 or Item 382.81 Various rates
C89/30	Aquilino J. March 6, 1989	K Mart Corp.	88–7–00559	Item 727.14 10.7
C89/31	Restani, J. March 9, 1989	Delco Electronics	85–10–01463	Item 685.21, 685.23 or 685 9.8%, 9.5%, 9.2%, 8.9%, 8.6%, 8.3% o
C89/32	Aquilino J. March 9, 1989	Erem, Inc.	85–11–01582	10% marking duties
C89/33	Aquilino J. March 9, 1989	Erem, Inc.	87–3–00463	10% marking duties
C89/34	Aquilino J. March 9, 1989	Erem, Inc.	87–11–01145	10% marking duties
C89/35	Aquilino, J. March 14, 1989	Mepco/Electra, Inc.	84–2–00227	Item 685.90 7.3% or 7.7%
C89/36	Aquilino, J. March 14, 1989	Mepco/Electra, Inc.	87–1–00038	Item 685.90 7.3%

ED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
d rate	Item No. and rate		
	Item 376.56 Various rates	A.N. Deringer, Inc. v. U.S., C.D. 4218 (1971); Izod Outerwear v. U.S., S.O. 85–72 (1985); H. Rosenthal v. U.S., C.D. 4769, *aff'd*, 609 F.2d. 999 (1979); Pacific Trail Sportswear v. U.S., S.O. 88–28 (1988)	New York Women's, girls' or infants' wearing apparel, etc.
	Item 222.41 6.3%	Agreed statement of facts	Los Angeles Baskets
5.12	Item 685.32 6%	Delco Electronics v. U.S., S.O. 87–109 (1987)	Cleveland Circuit boards boards for automobile radios
or 8%			
	Refund of marking duties	Agreed statement of facts	Los Angeles Tweezers
	Refund of marking duties	Agreed statement of facts	Los Angeles Tweezers
	Refund of marking duties	Agreed statement of facts	Los Angeles Tweezers
%	Item A685.90 Free of duty	Texas Instruments, Inc. v. U.S., 681 F.2d 778 (1982) and Torrington Co. v. U.S., 764 F.2d 1563 (1985)	Miami Relays
	Item A685.90 Free of duty	Texas Instruments, Inc. v. U.S., 681 F.2d 778 (1982) and Torrington Co. v. U.S., 764 F.2d 1563 (1985)	Miami Relays

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V89/3	Watson, J. March 16, 1989	Texas Instruments, Inc.	83-10-01398	Constructed value	54

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HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
4.977% of entered value (net of all allowances under item 807.00	Agreed statement of facts	Dallas Semiconductor devices

Appeals to the U.S. Court of Appeals for the Federal Circuit

American Motorists Insurance Co. *v.* United States, 13 CIT ——, Slip Op. 89–20 (Feb. 15, 1989), *appeal docketed,* No. 89–1269 (Fed. Cir. Feb. 21, 1989).

Arjay Associates, Inc. *v.* United States, 13 CIT ——, Slip Op. 89–24 (Feb. 21, 1989), *appeal docketed,* No. 89–1311 (Fed. Cir. March 3, 1989).

Chaparral Steel Co. *v.* United States, 12 CIT ——, Slip Op. 89–129 (Sept. 28, 1988), *appeal docketed,* No. Mis 231 & 232 (Fed. Cir. Feb. 2, 1989).

George Weintraub & Sons, Inc. *v.* United States, 12 CIT ——, Slip Op. 88–159 (Nov. 21, 1988), *appeal docketed,* No. 89–1242 (Fed. Cir. Feb. 3, 1989).

Goldhofer Fahreugwerk GmbH & Co. *v.* United States, 13 CIT ——, Slip Op. 89–7 (Jan. 18, 1989), *appeal docketed,* No. 89–1298 (Fed. Cir. March 2, 1989).

Hasbro Industries, Inc. *v.* United States, 12 CIT ——, Slip Op. 88–145 (Oct. 25, 1988), *appeal docketed,* No. 89–1202 (Fed. Cir. Jan. 10, 1989).

Peerless Insurance Co. *v.* United States, 12 CIT ——, Slip Op. 88–177 (Dec. 30, 1988), *appeal docketed,* No. 89–1275 (Fed. Cir. Feb. 22, 1989).

Decisions of the U.S. Court of Appeals for the Federal Circuit

Madison Galleries, Ltd. *v.* United States, 12 CIT ——, Slip Op. 88–71 (June 7, 1988), *aff'd*, No. 88–1559 (Fed. Cir. March 8, 1989).

Mitsui Foods, Inc. *v.* United States, 12 CIT ——, Slip Op. 88–42 (March 30, 1988), *aff'd*, No. 88–1427 (Fed. Cir. Feb. 8, 1989).

NEC America, Inc. *v.* United States, 11 CIT ——, Slip Op. 87–139 (Dec. 18, 1987), *aff'd*, No. 88–1258 (Fed. Cir. Sept. 28, 1988), *cert. denied*, Feb. 21, 1989.

Phone Mate, Inc. *v.* United States, 12 CIT ——, Slip Op. 88–79 (June 17, 1988), *aff'd*, No. 88–1514 (Fed. Cir. Feb. 9, 1989).

Smith Corona Corp. *v.* United States, 12 CIT ——, Slip Op. 88–127 (Sept. 20, 1988), *dismissed*, Nos. 89–1140, –1141 (Fed. Cir. Feb. 1, 1989).

Superior Wire *v.* United States, 11 CIT ——, Slip Op. 87–98 (Aug. 21, 1987), *aff'd*, No. 88–1020 (Fed. Cir. Feb. 15, 1989).

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